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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LEONARD L. LISIECKI,
Petitioner,

v.

FEDERAL HOME LOAN BANK BOARD and
MERIT SYSTEMS PROTECTION BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether the Merit Systems Protection Board is properly proscribed from reviewing and, where appropriate, mitigating the severity of removal or reduction-in-grade (demotion) sanctions imposed by an employing Federal agency upon an employee in an action taken for unacceptable performance under 5 U.S.C. § 4303 (1982)?*

* All parties to the proceeding below are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PRELIMINARY STATEMENT

Petitioner Leonard L. Lisiecki prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in *Leonard L. Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558 (Fed. Cir. 1985) on August 2, 1985, and the same court's denial of petitioner's petition for rehearing and declining of petitioner's timely suggestion for rehearing *in banc* entered on September 20, 1985.

OPINIONS BELOW

The decision by the presiding official of the Merit Systems Protection Board in *Lisiecki v. Federal Home Loan Bank Board*, MSPB Docket No. CH04328410250,

was issued on May 29, 1984.[1] The opinion and order of the Merit Systems Protection Board issued on October 22, 1984, reversed, by a 2-1 vote, the decision of the presiding official as to his finding modifying the action by the Federal Home Loan Bank Board. See *Lisiecki v. Federal Home Loan Bank Board*, 23 M.S.P.R. 633 (1984).[2] The United States Court of Appeals for the Federal Circuit affirmed the opinion and order of the Merit Systems Protection Board on August 2, 1985. See *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558 (Fed. Cir. 1985).[3] On September 20, 1985, the same court of appeals denied petitioner's timely petition for rehearing and declined petitioner's suggestion for rehearing *in banc*.[4]

JURISDICTION

This petition for certiorari has been timely filed within the allowed time period following an order by the United States Court of Appeals for the Federal Circuit denying petitioner's petition for rehearing issued on September 20, 1985. The date of the judgment sought to be reviewed is August 20, 1985. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS

This case involves a number of provisions contained in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (hereinafter also "Reform Act" or "Civil Service Reform Act"). Of particular significance to this case are 5 U.S.C. § 4303 (1982), 5

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[1] Appendix C at 56a (hereinafter "Pet. App." followed by the appropriate letter and page number(s)) in the separately bound Appendices accompanying this petition.

[2] Pet. App. B at 23a.

[3] Pet. App. A at 1a.

[4] Pet. App. E at 65a.

U.S.C. § 7701 (1982), 5 U.S.C. § 7703 (1982), and 5 U.S.C. Chapter 75, Subchapter II (1982). The text of the statutory provisions involved in this case are set forth in the appendix accompanying this petition.[5]

STATEMENT OF THE CASE

1. As a result of the Civil Service Reform Act of 1978, personnel actions against most federal employees for unacceptable performance are now governed by 5 U.S.C. Chapter 43, Subchapter I (1982). Under § 4302 (b)(1), employing agencies are required to establish performance standards which permit accurate evaluation of job performance on the basis of objective criteria. In turn, the performance standards and critical elements for that job must be communicated to employees at the beginning of each appraisal period.[6] A "critical element" is a component of the employee's job of such importance that performance below the standards may be the basis for reducing in grade or removing the employee.[7] An employee who continues to have unacceptable performance may be reassigned, demoted, or removed, but only after an opportunity to demonstrate acceptable performance.[8]

Under § 4303 an employing agency may take a removal or demotion action against an employee for unacceptable performance. An employee (with exceptions not here relevant) who has been demoted or removed for unacceptable performance is authorized by § 4303(e) to appeal "the action" to the Merit Systems Protection

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[5] Pet. App. F at 66a. References hereinafter to sections are to sections of Title 5, U.S. Code (1982), unless otherwise indicated.

[6] § 4302(b)(2), Pet. App. F at 70a.

[7] *National Treasury Employees Union v. Federal Labor Relations Authority*, 691 F.2d 553, 556 (D.C. Cir. 1982).

[8] § 4302(b)(6), Pet. App. F at 71a.

Board (hereinafter "MSPB").[9] Should the MSPB rule unfavorably, the aggrieved employee may seek judicial review of the final order or decision of the MSPB under § 7703. Exclusive jurisdiction to review final orders or decisions of the MSPB rests with the United States Court of Appeals for the Federal Circuit (hereinafter "Federal Circuit" or "court of appeals").[10]

2. Petitioner Leonard L. Lisiecki (hereinafter "Lisiecki") became a career Federal employee with the Federal Home Loan Bank Board (hereinafter "FHLBB") in 1972. For the ten-year period prior to April, 1983, Lisiecki performed satisfactorily as a Savings and Loan Examiner and received promotions from a GS-7 to a GS-11 grade level during this time.[11]

In April, 1983, Lisiecki's performance was evaluated by a FHLBB supervisor. The FHLBB supervisor decided that Lisiecki's performance was deficient because of his alleged failure to satisfy the criteria of "critical element 6." This element required GS-11 Savings and Loan Examiners to develop final reports and documents in accordance with a FHLBB manual. Lisiecki was informed at the time of the evaluation that he was being placed for the next 180 days on a "corrective action work plan" (hereinafter "CAWP") purportedly designed for assisting Lisiecki in improving his performance. After the passage of 180 days, the FHLBB supervisor decided that

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[9] Additionally, if an employee is in a bargaining unit for which a labor organization is certified as exclusive representative and for which a grievance procedure has been negotiated which covers actions taken by the employing agency under § 4303, an employee subject to a § 4303 action has the option of filing a grievance under the negotiated procedure or appealing to the MSPB. *Cornelius v. Nutt*, —— U.S. ——, 105 S. Ct. 2882, 2885 (1985).

[10] § 7703(b)(1), Pet. App. F at 86a.

[11] Pet. App. C at 61a. The facts set forth here are from the decision of the MSPB presiding official. At no time were the factual findings of the presiding official reversed.

Lisiecki's performance still failed to meet the criteria of "critical element 6." Yet Lisiecki was rated unsatisfactory on "critical element 6" only on the first of the four projects he was assigned during the CAWP period. Lisiecki was also found to perform two projects successfully at a GS-9 level during the CAWP period.[12] All other elements of the job were performed satisfactorily by Lisiecki.[13] Nevertheless, the FHLBB supervisor proposed that Lisiecki be removed from Federal employment for failure to meet "critical element 6," and Lisiecki was thereafter separated under § 4303.

3. Lisiecki appealed his removal to the MSPB as permitted by § 4303(e) and § 7701, and a hearing was held before a MSPB presiding official.[14] Afterwards the MSPB presiding official issued a decision in which he stated that the FHLBB demonstrated Mr. Lisiecki's unacceptable performance of "critical element 6" by substantial evidence.[15] At the same time, the presiding official found that the sanction of removal, as opposed to a lesser sanction such as demotion to a lower grade position, exceeded the tolerable limits of reasonableness in light of a number of mitigating circumstances. Cited as mitigating circumstances by the presiding official were Lisiecki's performance and promotions over the ten years prior to April, 1983, while a Savings and Loan Examiner, Lisiecki's failure to meet "critical element 6" on only one project during the CAWP period, Lisiecki's satisfactory performance of GS-9 level work during the CAWP period, and Lisiecki's satisfactory performance of all elements of his job other than "critical element 6."[16] Accordingly, the MSPB presiding official reversed the re-

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[12] Pet. App. C at 57a-58a.

[13] Pet. App. C at 61a.

[14] Pet. App. C at 56a.

[15] Pet. App. C at 59a.

[16] Pet. App. C at 61a.

moval action and ordered the FHLBB to substitute an action reducing Mr. Lisiecki in grade to a GS-9 position.[17]

The FHLBB appealed to the full MSPB, asserting *inter alia* that the MSPB lacks authority to review agency-imposed sanctions and mitigate unreasonable sanctions in performance-based actions taken against employees under § 4303. The full MSPB, by a 2-1 vote with Vice Chair Johnson dissenting, agreed with the FHLBB and held it had no such authority.[18] The MSPB majority found that references to employee rights in the legislative history of the Civil Service Reform Act were outweighed by "the dominant intent of Chapter 43" to "simplify and expedite procedures for dismissals of Federal employees whose performance is below the acceptable level (citations omitted)."[19] Additionally, the MSPB majority found that the reasons for the existence of MSPB review and mitigation authority over sanctions imposed upon employees in personnel actions (generally for misconduct reasons) under 5 U.S.C. Chapter 75, Subchapter II (1982) (hereinafter "Chapter 75")[20] were inapplicable to sanctions imposed for unacceptable performance under § 4303.[21] Finally, the MSPB majority rejected any applicability of § 7703 (covering judicial review of MSPB decisions) to the question of the scope of the MSPB's review powers.[22] Accordingly, the MSPB reversed the presiding official and sustained the FHLBB's removal of Mr. Lisiecki.

In dissent to the MSPB majority's opinion, MSPB Vice Chair Johnson stated "that the statutory construction

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[17] *Id.*

[18] *Lisiecki v. Federal Home Loan Bank Board*, 23 M.S.P.R. 633 (1984) (Pet. App. B at 23a).

[19] 23 M.S.P.R. at 638-39 (Pet. App. B at 30a).

[20] The MSPB held in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981), that it could review the severity of sanctions imposed in personnel actions under 5 U.S.C. Chapter 75.

[21] 23 M.S.P.R. at 643-46 (Pet. App. 37a-40a).

[22] 23 M.S.P.R. at 646 (Pet. App. B at 40a-41a).

which is most in harmony with the overall design and purpose of the Reform Act is that Congress intended the Board to review Chapter 43 sanctions but to afford even more deference to the agency's exercise of discretion than the Board does in reviewing Chapter 75 penalties." [23] Vice Chair Johnson noted the power of the Civil Service Commission (predecessor to the MSPB) to modify agency penalties and the absence of any indication in the legislative history that Congress disapproved of MSPB review and modification of agency sanctions.[24] Vice Chair Johnson also expressed her belief that procedural protections for employees and management discretion to take performance-based personnel actions are consistent purposes of the Civil Service Reform Act and that any safeguards for employees are meaningless if the MSPB lacks authority to review the agency's selection of a sanction under § 4303.[25] Additionally, Vice Chair Johnson chided the majority opinion for the absence of any analysis of § 7701, § 1205(a), and § 7703(c) which, in Vice Chair Johnson's opinion, reflected the inherent power of the MSPB to review sanctions under § 4303.[26] In regard to § 7703(c), Vice Chair Johnson observed that "[t]here is absolutely no indication in the Reform Act that the selection of a Chapter 43 sanction is either committed to the employing agency's discretion or to the Board's discretion, nor is judicial review of this issue statutorily precluded." [27] As a consequence, Vice Chair Johnson thought it "incumbent upon the Board, as an adjudicating agency whose decisions are subject to judicial review, to review the agency's discretion in selecting the Chapter 43 sanction or remedy (footnote omitted)." [28]

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[23] 23 M.S.P.R. at 647 (Pet. App. B at 44a).

[24] 23 M.S.P.R. at 649-50 (Pet. App. B at 44a-46a).

[25] 23 M.S.P.R. at 650-52 (Pet. App. B at 46a-49a).

[26] 23 M.S.P.R. at 652-54 (Pet. App. B at 49a-51a).

[27] 23 M.S.P.R. at 653 (Pet. App. B at 51a).

[28] 23 M.S.P.R. at 653-54 (Pet. App. B at 51a).

4. Following the unfavorable MSPB decision, Lisiecki petitioned for review to the United States Court of Appeals for the Federal Circuit. On August 2, 1985, a three judge panel of the Federal Circuit affirmed the MSPB's decision that it lacked review powers over unreasonable sanctions imposed in performance-based actions under § 4303.[29] The Federal Circuit placed no reliance on any specific statutory provision of the Reform Act. In fact, at one point the court of appeals rejected, without discussion, any assertion that MSPB review powers over § 4303 sanctions derive from § 7701, § 4303(e), § 1205(a), or § 7703(c) (the latter covering judicial review of MSPB decisions).[30] Instead, while recognizing that "the legislative history does not address the issue explicitly," the Federal Circuit described the legislative history as "highly instructive, sufficiently so as to support the board's result."[31] The Federal Circuit concluded from its analysis of the legislative history that "the dominant intent of chapter 43" was to simplify and expedite procedures for dismissal of Federal employees.[32] In particular, the Federal Circuit noted the lowering of an agency's burden of proof before the MSPB from "preponderance of the evidence" to "substantial evidence" in actions taken under § 4303 and the absence of the "efficiency of the service" standard in § 4303 which is present for actions taken under 5 U.S.C. Chapter 75. As to these factors, the Federal Circuit claimed they gave "a clear indication of congressional intent to restrict the board's authority in reviewing chapter 43 actions."[33] The Federal Circuit then summarily adopted the MSPB's

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[29] *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558 (Fed. Cir. 1985) (Pet. App. A at 1a).

[30] 769 F.2d at 1567 (Pet. App. A at 16a).

[31] 769 F.2d at 1561 (Pet. App. A at 4a).

[32] 769 F.2d at 1564 (Pet. App. A at 10a).

[33] 769 F.2d at 1565 (Pet. App. A at 12a).

explanation of why the rationale for finding MSPB power to review and mitigate unreasonable sanctions in 5 U.S.C. Chapter 75 cases was inapplicable to cases under § 4303.[34] Finally, the Federal Circuit placed reliance on dicta from its opinion in *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985).[35] Following its opinion, the court of appeals denied Lisiecki's timely petition for rehearing on September 20, 1985.[36]

REASONS FOR GRANTING THE PETITION

1. This case presents a question of paramount importance to the scope of MSPB and judicial review of the harshness with which an employing agency treats an employee found to perform unacceptably. Congress made clear in its statement of purpose to the Civil Service Reform Act that:

> It is the policy of the United States that—
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> * * * *
>
> (3) Federal employees should receive appropriate protection through *increasing* the authority and powers of the Merit Systems Protection Board in processing hearings and appeals affecting Federal employees.[37]

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[34] 769 F.2d at 1566 (Pet. App. A at 15a).

[35] 769 F.2d at 1567-68 (Pet. App. A at 17a-18a). The issue in *Lovshin* (*i.e.*, whether an employing agency is empowered to take a performance-based action under 5 U.S.C. Chapter 75) concerns the powers of an employing agency, while the issue in the present case concerns the powers of the MSPB. Therefore, the Federal Circuit in *Lovshin* was not attempting to define the scope of the MSPB's powers, and the statements from *Lovshin* relied upon by the Federal Circuit in the present case are dicta, apparently made without benefit of any authorities or argument addressing the present issue.

[36] Pet. App. E at 65a.

[37] Pub. L. No. 95-454 § 3(3), 92 Stat. 1111, 1112 (1978), *reprinted in* 5 U.S.C.A. § 1101 note (emphasis added).

Prior to the Civil Service Reform Act, the MSPB's predecessor, the Civil Service Commission, reviewed and mitigated sanctions in performance-based personnel actions.[38] In denying such review and mitigation power under the Reform Act the Federal Circuit effectively decreases the MSPB's authority and powers in clear contravention of the expressly stated Congressional purpose. Moreover, the Federal Circuit departs from the statement of Congressional policy without finding any explicit statutory provision or legislative history addressing MSPB review powers over § 4303 sanctions. Should the present opinion remain operative, any employing Federal agency will have the unchecked power to impose arbitrary or irrational removals or demotions in performance-based cases. Such an agency, under the court of appeals' decision, is totally free to remove an employee entirely from Federal service for unacceptable performance even if the employee could provide beneficial service to the Government in another position. Whether Congress in fact established a new adjudicatory agency, the MSPB, to provide "appropriate protection" for Federal employees while, at the same time, limiting MSPB review so as to permit arbitrary and irrational § 4303 sanctions is an important question affecting the rights of employees of every Federal agency.[39]

The impact of the court of appeals' decision, furthermore, is not limited to the rights of Federal employees before the MSPB. The court of appeals' decision is a *de facto* denial of appellate court jurisdiction to Federal employees challenging the severity of an agency-imposed

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[38] See the dissenting opinion of MSPB Vice Chair Johnson in *Lisiecki v. Federal Home Loan Bank Board, supra,* 23 M.S.P.R. at 652-53, n.10 (Pet. App. B at 50a).

[39] Another situation where the MSPB erroneously refused to recognize its own authority was in the enforcement of MSPB decisions where the employee returns to active duty. See *Kerr v. National Endowment for the Arts,* 726 F.2d 730 (Fed. Cir. 1984).

sanction under § 4303. If the MSPB lacks the power to review § 4303 sanctions, the end result is that evidence demonstrating the unreasonable harshness of the sanction will be prevented from entering the record before the MSPB. In turn, if an employee invokes his or her right to judicial review by the Federal Circuit under § 7703 of an order or decision of the MSPB, the court is directed by § 7703(c) to "review the record." Without the introduction of any evidence before the MSPB on the unreasonableness of the agency's § 4303 sanction, it is impossible for the court of appeals to review the severity of the agency-imposed sanction. Consequently, for the MSPB to lack review powers over an unreasonable § 4303 sanction compels the result that the court of appeals similarly lacks such review powers.

However, no language appears in § 4303 or § 7703 indicating that judicial review of § 4303 sanctions is forbidden. In fact, removal and demotion actions under both § 4303 and 5 U.S.C. Chapter 75 are reviewed by the Federal Circuit under the same "arbitrary and capricious" standard of review set forth in § 7703(c)(1). In reviewing cases under Chapter 75, the Federal Circuit, and its predecessor, the Court of Claims, have reviewed and reversed decisions where the removal of the employee by the employing agncy was too severe a sanction.[40] Since no differentiation is made under § 7703 between judicial review of Chapter 75 cases and § 4303 cases, the irrecusable conclusion is that § 4303 sanctions are similarly reviewable. The contrary denial of judicial review to employees victimized by irrational § 4303 sanc-

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[40] *Hagmeyer v. Dept. of Treasury*, 757 F.2d 1281, 1285 (Fed. Cir. 1985); *Brown v. Dept. of Transportation*, 735 F.2d 543, 548-49 (Fed. Cir. 1984); *Boyce v. United States*, 543 F.2d 1290 (Ct. Cl. 1976); *Power v. United States*, 531 F.2d 505, 507-10 (Ct. Cl. 1976).

tions merits the attention of the Court,[41] especially since the petitioned-from decision controls all MSPB and judiciew review of performance-based actions henceforth as a consequence of the Federal Circuit's exclusive jurisdiction pursuant to § 7703.

2. The importance of this Court's review of the "narrow but *vitally important issue of statutory construction of first impression in this court*" [42] is magnified by the Federal Circuit's lack of analysis of the pertinent statutory language. While referring to the issue in this case as "not a simple one" [43] and describing it as one of "difficulty and importance," [44] the Federal Circuit's decision failed to analyze the authorization for judicial review of MSPB decisions contained in § 7703 and ignored the overall legislative framework, including the express statutory powers and functions of the MSPB, that together demonstrate the MSPB's review authority over § 4303 sanctions. Its denial of the rights of Federal employees to secure review of unreasonable § 4303 sanctions is inconsistent with the statutory language manifesting Congress' desire for the MSPB to exercise review powers over these sanctions.

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[41] In *Lindahl v. Office of Personnel Management*, —— U.S. ——, 105 S. Ct. 1620 (1985), the Court granted certiorari to review, and ultimately reversed, a decision of the Federal Circuit holding that a right to judicial review of Office of Personnel Management decisions in voluntary disability retirement cases does not exist. Similarly here, the Federal Circuit has acted to deny Federal employees access to judicial review. In addition, while *Lindahl* concerned a statutory provision under which denial of access to judicial review was at least arguable, no statutory provision is present in this case to preclude judicial review over irrational § 4303 sanctions.

[42] 769 F.2d at 1559 (Pet. App. A at 1a) (emphasis added).

[43] 769 F.2d at 1560 (Pet. App. A at 4a).

[44] 769 F.2d at 1561 (Pet. App. A at 4a).

Section 4303(a), in this regard, states that "[s]*ubject to the provisions of this section*, an agency may reduce in grade or remove an employee for unacceptable performance" (emphasis added). One of the provisions of § 4303, and thereby one of the provisions that restrict the employing agency's power under § 4303(a) to demote or remove for unacceptable performance, is § 4303(e). Under § 4303(e), "[a]ny employee who is a preference eligible or is in the competitive service and who has been reduced in grade or removed under this section is entitled to appeal *the action* to the Merit Systems Protection Board under section 7701 of this title" (emphasis added). "The action" as used in § 4303(e) does not merely denote the agency's action in finding that an employee has failed to meet a critical element of his or her job. Rather "the action" is the *personnel action* taken by the agency as a consequence of that finding, *i.e.*, the removal *or* demotion.[45] Thus, the language of § 4303(a) and (e), read together, indicates that the MSPB has the power of review over the sanction.

In turn, the statutory provisions governing MSPB appeals set forth in § 7701 reflect the MSPB's powers to review the severity of a sanction in a § 4303 case. Under § 7701(c)(1)(A), ". . . the *decision* of the agency shall be sustained . . . only if the agency's decision in the case of an action based on unacceptable performance described in Section 4303 of this title, *is supported by substantial evidence*" (emphasis added). Therefore, it is the "decision of the agency," rather than only the findings by the agency that an employee has failed to meet a critical element, which must be proven by substantial evidence. "Decision" is a broad term indicating inclusion of the decision to impose a certain sanction under § 4303. Thus

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[45] As an example of another statute where "action" indicates review of the penalty is authorized, see *Goodman v. United States*, 518 F.2d 505, 510 (4th Cir. 1975). See also *Douglas v. Veterans Administration*, *supra*, 5 MSPB at 316 n.11.

if an employee, such as Mr. Lisiecki, is found to fail to meet a critical element of his or her job, an employing agency may properly impose some sanction under § 4303. Yet, if removal is unnecessary to correct the unacceptable performance, and if there are no other facts presented by the agency to demonstrate that the sanction of removal (as opposed to a lesser sanction) is a reasonable exercise of the agency's judgment, the *decision* to remove (as opposed to a lesser sanction) is *not* a "decision . . . supported by substantial evidence" within the meaning of § 7701(c)(1)(A).

Under § 7701, as well, the only explicit differentiation between the MSPB's processing of performance-based cases under § 4303 and the processing of cases under 5 U.S.C. Chapter 75 (generally covering misconduct cases) is the agency's burden of proof.[46] Moreover, according to a summary of S. 2640 (the Senate bill on the eventual Civil Service Reform Act) prepared by Senate Republicans and addressing the handling by the MSPB of 5 U.S.C. Chapter 75 cases and § 4303 cases, "[t]*he difference* between the two types of cases *is in the burden of proof* needed to sustain the agency action" (emphasis added).[47] Except for the agency's *burden of proof*, according to this summary, the MSPB's review is the same in Chapter 75 and § 4303 cases. The MSPB in Chapter 75 cases not only can review the severity of the sanction, but also can mitigate an arbitrarily harsh sanction.[48] It

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[46] Under § 7701(c)(1), an agency has a burden of proof of "substantial evidence" in § 4303 cases and "preponderance of the evidence" in cases under 5 U.S.C. Chapter 75, Subchapter II.

[47] 124 Cong. Rec. 27539 (August 24, 1978).

[48] *Douglas v. Veterans Administration, supra. In Nagel v. Dept. of Health and Human Services*, 707 F.2d 1384, 1386-87 (Fed. Cir. 1983), *Weston v. Dept. of Housing and Urban Development*, 724 F.2d 943, 950 (Fed. Cir. 1983), and *Hayes v. Dept. of the Navy*, 727 F.2d 1535, 1540 (Fed. Cir. 1984), the Federal Circuit noted the holding in *Douglas* without suggesting that the holding was improper.

would be anomalous for Congress to have intended the MSPB to review the harshness of a removal taken under Chapter 75 against an employee who committed assault or embezzlement or took drugs on the job while at the same time not to have intended the MSPB to review the harshness of a removal imposed upon an employee, such as Mr. Lisiecki, with over ten years' experience in his position, who is found competent to perform lower graded work.

Had Congress intended such a result, this limitation on MSPB authority would have been stated in § 1205, which explicitly details the "powers and functions" of the MSPB. Congress knew how to limit the review power of the Board, as the express limitation at § 1205(e)(3)(B) indicates: "Any review conducted by the Board pursuant to this subsection [authorizing MSPB review of the rules and regulations issued by the Director, Office of Personnel Management] *shall be limited to determining*—(i) the validity on its face of the provision under review and (ii) whether the provision under review has been validly implemented." (Emphasis added.) No such language imposing a comparable limitation on MSPB review of § 4303 sanctions is present. Indeed, the MSPB is granted broad authority at § 1205(a)(1) to "adjudicate . . . all matters . . . and . . . take final action on any . . . matter[.]" Consequently, the irrefragable conclusion is that the MSPB can review the severity of a sanction and mitigate an unreasonable sanction in a § 4303 case just as the MSPB is authorized to review sanctions in Chapter 75 cases.

3. These review powers of the MSPB over removal or demotion actions, furthermore, were intended to be carried over from the adjudicatory powers held by the predecessor Civil Service Commission (CSC). Prior to the enactment of the Reform Act, the CSC reviewed penalties and mitigated unreasonable penalties in performance-

based Chapter 75 actions.[49] The House Report specifically stated that "[t]he Merit Systems Protection Board will take over the appellate authority now vested in the Civil Service Commission," [50] and it was the House version of § 4303 which was included in the final Civil Service Reform Act.[51] Moreover, Reorganization Plan No. 2 was submitted to Congress by President Carter on May 23, 1978, prior to either the House or Senate Reports on the Civil Service Reform Act.[52] Under § 202(a) of the Reorganization Plan, the MSPB inherited the hearing, adjudication, and appeals functions of the Civil Service Commission.[53] Congress' knowledge of the Reorganization Plan and its failure to specify any change in MSPB review powers in light of the Reorganization Plan reflects Congress' intent for the MSPB to have the same review powers as held previously by the Civil Service Commission.

4. The Federal Circuit relied primarily upon the legislative history of the Reform Act in holding that the MSPB lacked review powers over § 4303 sanctions. In its analysis, the Federal Circuit's decision misapprehends the portion of the legislative history it relies upon by not analyzing these portions in the context of the entire legislative scheme. Petitioner agrees with the court's opinion insofar as it indicates that a purpose of § 4303 was to

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[49] See *Lisiecki v. Federal Home Loan Bank Board*, *supra*, 23 M.S.P.R. at 652-53, n.10 (dissenting opinion of MSPB Vice Chair Johnson); Pet. App. B at 50a.

[50] H.R. Rep. No. 95-1403 on H.R. 11280, 95th Cong., 2d Sess. 6 (1978).

[51] Compare § 4303 with the § 4303 proposed in H.R. 11280 [H.R. Rep. No. 95-1403 on H.R. 11280, 95th Cong., 2d Sess., 191-92 (1978)] and with the § 4303 proposed in S. 2640 [S.Rep. No. 95-969 on S. 2640, 95th Cong., 2d Sess., 178-79 (1978)].

[52] Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36037 (1978), *reprinted in* 5 U.S.C.A. § 1101 note (1982).

[53] *Id.*, § 202(a), 43 Fed. Reg. at 36038, *reprinted in* 5 U.S.C.A. § 1101 note (1982).

facilitate performance-based actions. However, this does *not* mean that Congress intended to make the severity of the sanctions imposed in § 4303 cases beyond review. As stated in the Senate Report, the purpose of the proposed legislation was to:

> . . . [a]llow civil servants to be able to be hired and fired more easily *but for the right reasons. This balanced bill* should help to accomplish that objective.[54]

The Senate Report later emphasized that the proposed legislation would protect "employees' rights to fair treatment," [55] and made clear that the Chapter 43 procedures would still provide "the employee his due process rights." [56] Thus, the purpose of the statute was to balance an agency's ability to facilitate performance-based actions with procedural protections for employees. It stands that intent on its head to hold that an employee could be subjected to a removal for unacceptable performance when there are no reasonable grounds to prevent the agency from placing the employee in a lower graded position where the employee can be fully productive. It further stands that intent on its head to hold that Congress created a right to appeal § 4303 actions to the MSPB but did not empower the MSPB to review a clearly unreasonable sanction. By not addressing the Congressional desire for protection of employee rights, the court's decision licenses the arbitrary penalties for performance deficiency Congress sought to prevent.[57]

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[54] S. Rep. No. 95-969 on S. 2640, 95th Cong., 2d Sess., 4, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2723, 2726 (emphasis added).

[55] *Id.* at 10, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 2732.

[56] *Id.* at 40, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 2762.

[57] Since a performance-based sanction under Chapter 75 can be mitigated by the MSPB and since there is no explicit statutory

Also ignored in the legislative scheme by the Federal Circuit was the fact that Congress took certain express steps to make it easier for agencies to take performance-based actions, but elimination of the mitigation authority of the MSPB (as successor to the Civil Service Commission) was *not* one of those steps. Congress lowered the agency's burden of proof before the MSPB in appeals from performance-based actions to one of substantial evidence under § 7701(c)(1)(A). Additionally, Congress eliminated a separate statutory appeal route for challenges to performance ratings under 5 U.S.C. § 4305 (1976) because this additional appeal route was "a deterrent to taking action that might otherwise be appropriate." [58] Given that Congress took specific action to facilitate performance-based actions, and further given the absence of any Congressional expression of dissatisfaction with the Civil Service Commission's review and mitigation authority,[59] the holding that the MSPB cannot review § 4303 sanctions, as noted in MSPB Vice Chair Johnson's dissent, "is squarely at odds with the well-settled principle of statutory construction that cautions against an inter-

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language authorizing mitigation of Chapter 75 penalties, the Federal Circuit's statement that § 3594 and § 3321(b) are the only statutory limitations on agency-selected sanctions (769 F.2d at 1565; Pet. App. A at 13a-14a) is incorrect. A better explanation of § 3594 and § 3321(b) is that certain sanctions are *per se* arbitrary and other sanctions are to be reviewed by the MSPB for arbitrariness or abuses of discretion. See MSPB Vice Chair Johnson's dissent in *Lisiecki, supra,* 23 M.S.P.R. at 652, n. 9 (Pet. App. B at 48a-49a).

[58] S. Rep. No. 95-969 on S. 2640, 95th Cong., 2d Sess., 40, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2723, 2762.

[59] It is always appropriate to assume that our elected representatives know the law, and when silent, legislate with existing law in mind. *Albernaz v. United States,* 450 U.S. 333, 341-42 (1981).

pretation that extends the reach of a statute beyond the correction of evils which the statute sought to remedy." [60]

The Federal Circuit's opinion also placed reliance on the absence in § 4303 of the "efficiency of the service" standard, which is present in § 7513(a), as a basis for the lack of MSPB review powers over § 4303 sanctions.[61] Yet the Senate Report made clear in the following that substitution of "unacceptable performance" for "efficiency of the service" was done to change *a standard* rather than make § 4303 sanctions unreviewable:

> One of the chief differences between the procedures currently applicable at the agency level and the proposed procedures concerns the standards governing the agency's action. . . . Section 4303(a) imposes a new standard. It is "performance which fails to meet established requirements in one or more critical elements of the job." [62] The Committee intends that this *new standard* should not be governed by the existing case law defining the present standard "such cause as will promote the efficiency of the service." [63]

The severity of a sanction is fully reviewable under this new § 4303 standard. Applying the standard to the facts in the present case as found by the MSPB presiding official, Mr. Lisiecki's "unacceptable performance" justified his being taken out of his GS-11 position. Yet his ability to perform at a GS-9 level and the absence of any countervailing factors made Mr. Lisiecki's *removal*, as opposed to the lesser penalty of *demotion*, a sanction unjustified by "unacceptable performance."

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[60] 23 M.S.P.R. at 650 (Pet. App. B at 46a), citing 73 Am. Jur. 2d *Statutes*, § 157 (1974).

[61] 769 F.2d at 1562, 1566 (Pet. App. A at 6a-7a, 15a).

[62] The language just cited is similar to the definition for "unacceptable performance" found in § 4301(3).

[63] S. Rep. No. 95-969 on S. 2640, 95th Cong., 2d Sess., 43, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2723, 2765 (emphasis added).

As stated in the dissenting opinion of MSPB Vice Chair Johnson, "the majority mistakenly believes that it must choose one purpose to the exclusion of any other in construing Congressional intent."[64] Review of § 4303 sanctions by the MSPB still allows employing agencies deference in their selection of a penalty for unacceptable performance. Nor is MSPB review of § 4303 sanctions unduly obtrusive. All that MSPB review over § 4303 sanctions need require is that an employing agency recognize any mitigating factors that should affect the harshness of a penalty and give reasonable consideration to those mitigating factors. It is clear that, as a result of the Reform Act, it is easier for employing agencies to remove employees for unacceptable performance. This purpose is assured by the lowering of the agency's burden of proof before the MSPB to "substantial evidence" and by elimination of the statutory right to appeal a performance rating. MSPB review over penalties for unacceptable performance, therefore, will not result in the inability to take performance-based actions Congress saw in the pre-Civil Service Reform Act era. Such MSPB review preserves both the legislative intent to make performance-based actions easier *and* the legislative intent to provide protection to affected employees so that the employees are not subjected to arbitrary or irrational penalties. By contrast, the Federal Circuit's rejection of MSPB review powers over arbitrary or irrational penalties for unacceptable performance is irreconcilable with a fundamental purpose of the Civil Service Reform Act.

5. In short, this case involves an important question of Federal law warranting this Court's review. Resolution of this case will determine whether Federal employees can secure review by the MSPB and the Federal Circuit of unreasonably harsh sanctions (such as petitioner's removal) in personnel actions taken for unacceptable performance under § 4303. The Federal Circuit's failure to

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[64] 23 M.S.P.R. at 650 (Pet. App. B at 47a).

analyze the pertinent statutory language or the entire legislative history in the context of the legislative scheme accentuates the need for this Court's review. Accordingly, this Court's review is justified in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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